



# ENVIRONMENTAL QUALITY COUNCIL

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## ENVIRONMENTAL QUALITY COUNCIL December 11, 2001 FINAL MINUTES

### COUNCIL MEMBERS PRESENT

SEN. BEA McCARTHY, Chair  
REP. DEBBY BARRETT  
SEN. MACK COLE  
REP. CHRISTOPHER HARRIS  
SEN. PETE EKEGREN  
REP. MONICA LINDEEN  
SEN. JON TESTER  
REP. DOUG MOOD  
REP. PAUL CLARK  
SEN. WALTER McNUTT  
REP. DON HEDGES  
SEN. KEN TOOLE

MR. HOWARD STRAUSE  
MR. TOM EBZERY  
MS. JULIA PAGE  
MS. ELLEN PORTER

### COUNCIL MEMBERS EXCUSED

MR. TODD O'HAIR

### STAFF MEMBERS PRESENT

MR. TODD EVERTS  
MR. LARRY MITCHELL  
MS. MARY VANDENBOSCH  
Ms. Robyn Lund, secretary

### VISITORS' LIST

Attachment 1

## **AGENDA**

### **Attachment 2**

## **COUNCIL ACTION**

- Approved minutes
- Accepted Subcommittee reports
- Held vote on Beaverhead/Big Hole management rules

### **I CALL TO ORDER**

**SEN. McCARTHY** welcomed committee.

### **II ADOPTION OF MINUTES**

**MOTION:** **SEN. COLE** moved to adopt the minutes from the September meeting.

**Discussion:**

**REP. HARRIS** asked that the word “critically” be changed to “particularly.”

**VOTE:** Motion passed unanimously.

### **III ADMINISTRATIVE MATTERS**

**MR. EVERTS** said that Krista Lee Evans, EQC staff, had a baby boy. He thanked MS. VANDENBOSCH and MR. MITCHELL for taking on MS. EVAN's duties until she returns.

### **IV SUBCOMMITTEE REPORTS**

- ***Coal Bed Methane/Water Policy Subcommittee***

**SEN. COLE** said that the Subcommittee talked with Art Compton, Department of Environmental Quality (DEQ) and Dr. Bauder, MSU, about scientific perspectives on the water produced by coal bed methane (CBM) wells. There may possibly be 9,000 CBM wells in the future; there are 250 wells currently. The rate of production of the water starts high and drops over the time that the well is producing.

The Friends of the Marias versus the Department of Natural Resources and Conservation (DNRC) case was discussed. This has to do with the Department of Fish, Wildlife and Parks (FWP) water right on the Marias. The Sunnybrook Colony was also given a water right on the river. The issue is the difference between 480 and 560 cubic feet per second. The Friends of the Marias felt that the amount of water left in the river for the fisheries should be higher. The FWP did not appeal the decision of the DNRC. There should be a hearing and a decision coming soon.

The Subcommittee also looked at the status of the environmental impact statement (EIS), as far as coal bed natural gas is concerned. The DEQ, Montana Board of Oil and Gas (MBOG), and Bureau of Land Management (BLM) were all represented in the discussion. The draft EIS is hoped to be out in January, but it may be held longer in order to add the air quality information. There will also be a 90-day public comment period with meetings held at approximately the 45<sup>th</sup> day.

The Subcommittee also heard presentations on managing the water that is produced as a by-product of CBM drilling. Mr. Searle gave a presentation that explained some of the alternative methods of managing that water. Jeff Barber, Montana Environmental Information Center (MEIC), and Steve Gilbert, Northern Plains Resource Council (NPRC), also spoke about the water concerns.

The last presentation heard by the CBM Subcommittee dealt with jurisdictions for permitting and leasing for CBM development. Representatives of the Environmental Protection Agency (EPA), Bureau of Land Management (BLM), DEQ and Montana Board of Oil and Gas Conservation (MBOGC) were present. The EPA has jurisdiction for tribal land with CBM concerns. There are two reservations that are affected by CBM.

**SEN. McCARTHY** said that the request was made for more time to talk with Dr. Bauder. After some discussions with staff, it was decided to add that discussion to the agenda for the full committee meeting in February.

**SEN. COLE** wants to make sure that there is time for background information. He would also like to hear from Bill Schafer.

**MR. EBZERY** wanted to hear more from John Wheaton.

**SEN. McCARTHY** said that staff would put that presentation together and provide members with some informational material for background.

- ***Energy Policy Subcommittee***

**REP. LINDEEN** said that the Subcommittee is still getting educated on the issue. The Northwest Power Planning Council gave a presentation on the status of the power supply system in the Pacific Northwest and Montana. The reliability of the northwest power system has increased and the prices have dropped. There has been 1,600 megawatts of new generation that came on line this year, 1250 megawatts of new generation is expected to come on line in June 2002.

There is more electrical power generated in Montana than is consumed, however, much of the generation is owned by out-of-state entities. Almost half of Montana's generation is exported.

There was also discussion about the default supply portfolio and the issues in front of the Public Service Commission (PSC). The three big issues that are still before the PSC are the settlement of the stranded costs, the approval of the sale of Montana Power Company's (MPC) generation facilities, and the approval of the default supply portfolio.

There were four presentations by the DEQ about the status of Montana's transmission system, transmission in the northwest, the basics of electricity pricing, and a discussion about the tie between natural gas and electricity prices.

Jeff Martin gave an update as to what the Transition Advisory Committee (TAC) is doing. The Subcommittee is trying to coordinate with TAC to prevent duplication between the committees.

The Subcommittee reviewed the draft table of contents for the energy law handbook. MR. EVERTS will have a draft in February. They also looked at another document prepared by MR. EVERTS that had a time line and all of the dates of the various issues, decisions, and initiatives.

**MR. EVERTS** said that a final draft of the energy handbook will be ready in May for public review and comment. It should be finalized in July 2002.

**REP. LINDEEN** said that the Subcommittee is also working on a state of the state report.

- ***Agency Oversight/MEPA Subcommittee***

**REP. HARRIS** said that the Oversight Subcommittee had a panel discussion with the DNRC, DEQ, FWP and Department of Transportation about the Montana Environmental Policy Act (MEPA) recommendations by the EQC issued in 2000, as well as the 2001 legislative changes. The agencies don't have enough experience with the 2001 legislative changes to make recommendations as to whether or not there are any problems. There will likely be some legislative changes needed in 2003.

The Subcommittee had a report on the Friends of the Marias case because there are some MEPA issues in the case. Staff also reviewed other ongoing MEPA litigation.

There was a discussion with the DEQ on the Comprehensive Environmental Clean-up and Responsibility Act (CECRA), the voluntary clean-up program, and the Controlled Allocation of Liability Act (CALA). **REP. HARRIS** was surprised to learn that the experiences where it was applied were positive. However, there may be a number of other sites where it was not able to be applied because it is a cumbersome process and may not work for smaller sites. Another aspect of the discussion was the high turnover rate in the DEQ on the remediation projects. The Subcommittee will also be looking for additional information on the Orphan Share program and its funding.

The Subcommittee was asked to look at the Big Hole Beaverhead seasonal rule.

**REP. BARRETT** said that you can't deal with the Big Hole rules without the subject of the Smith River coming up. Developing rules for the Smith River was a long process. In 1983, a consultant was hired to write environmental assessments, alternatives and a no action alternative. In 1989, legislation was passed. This legislation included the guideline to write the rules. More public comment followed.

Another example is Flathead Lake. An advisory group came up with a plan that protected the resource and the economy.

An advisory group on the Beaverhead River also came up with a plan. The Fish, Wildlife and Parks (FWP) Commission then rejected that plan and wrote its own alternative plan and adopted and implemented it. It wasn't a balanced plan and businesses were harmed. She stated that the state's resources and communities need to be protected through a balanced plan. She suggested that the EQC could sponsor legislation to help deal with the guidelines and criteria for these social conflicts. We need to remove the politics from these issues.

**REP. HARRIS** said that they heard an extensive, but contentious hearing. The issue was a legal one dealing with whether the FWP invoked the seasonal exception to the Montana Administrative Procedures Act (MAPA) properly. This rule addresses outfitters' rights and prohibits transfer of property rights. That is contradicted by the fact that the rule also creates a moratorium, therefore restricting those same property rights. The entirety of the rule needs to be put on signs, so the rule needs to be kept short and concise. He feels that the Commission acted in good faith.

The Subcommittee adopted a compromise between the two sides. It is the recommendation that the EQC object to the rule in its entirety. The objection would have an effective date of May 30, 2002, to make sure that the rule, as it is now, stays in effect. Also, part of the recommendation is that all of the rule making efforts that have already been done in making the seasonal rule be incorporated into the new rule making process. This has the effect of allowing the Commission to go forward with the rule that it wants to go forward with anyway, but sends a signal that the seasonal exception to MAPA shouldn't be used. The Commission would have a six-month time period to get the new permanent rule enacted. The motion was adopted in the Subcommittee on a 2 to 1 vote.

**MOTION: REP. HARRIS** moved to adopt the Subcommittee recommendation.

#### **Discussion:**

**MR. STRAUSE** said that he was the one who voted against the motion in Subcommittee. The issue should be whether the rule was legally adopted. The Subcommittee received a lot of legal information and he was convinced that the FWP had the legal authority to adopt this as a seasonal rule. The Big Hole rule and the Smith River rule have the same basic elements, although they are not the same rule. Both rules limit the number of people that can float the river, the number of outfitters that have the right to float, the number of days that the outfitters are allowed to float the river, etc. The advisory committee's recommendations were not adopted in total by the FWP, but the FWP had the right to not use, in total, what the advisory committee recommended.

This is not a partisan issue; it is contentious because various people have various ideas on whether it was properly adopted or not. Legislation to clarify what the FWP can do with a seasonal rule might be appropriate, but in the mean time the rule should be left as is. It is only in effect until 2003. The FWP intends to start developing a river management plan in the spring, which would be more permanent. MR. STRAUSE sees harm to the resource and the people who use the river if the rule is done away with. There could be increased competition in order for outfitters to increase their historical use numbers.

**SEN. McCARTHY** said that there would not be public comment at this time, but there will be discussion. She asked Mr. Hagener, FWP, to answer questions.

**Mr. Hagener** said that the Commission feels that they have gone through a substantial amount of review to get to where they are now. It is still in the Commission's authority to take the EQC's advice and decide what to do with it. The Commission can't put a new rule in place by May. It would appear to be that the two alternatives that come out of this is to acknowledge what the EQC has said and either use MAPA for the next process, or to void the rule, which would open the river this year because the new rule would not be put in place by May.

**SEN. TESTER** asked if Sen. Tash was in favor of the rule. **REP. BARRETT** said that was correct.

**SEN. TESTER** asked if the advisory committee made a recommendation that this be a biennial rule. **Mr. Hagener** said that the advisory committee did make recommendations, but the recommendations did not fall within what the Commission had originally given the advisory group. The Commission asked the groups to go back. The groups did and they came up with where the compromise is now.

**SEN. COLE** asked if the FWP could put rules in by May and, if not, why. **Mr. Hagener** said that it took 18 months to get where they are now. Six months would not allow for the full MAPA process and public hearings.

**SEN. COLE** asked what the changes would be on May 30. **REP. HARRIS** said that rule would remain in effect until May 30, then it is up to the Commission to decide how they want to proceed. This motion would send a strong signal to the Commission that it needs to use the full MAPA process. He recognizes that six months is a tight time frame, but he feels that it is achievable. **REP. BARRETT** said that there was a stipulation that the process continue because these were temporary rules. The FWP has no ongoing group meeting. They have petitioned the Governor to appoint a statewide board. The FWP has every authority of their own to appoint a statewide board. If they are short of time, it is their own fault.

**MR. EBZERY** asked if the rule was changed from what **REP. BARRETT** thought it was going to be in draft form. **REP. BARRETT** said that was partly it. The politics that she referred to is the agency politics. The MEPA panel at the meeting said that the advisory group allows the agency tools and tailoring, that can be controlled to a degree by the agency through appointments and a side board.

**MR. EBZERY** asked if **MR. STRAUSE** felt that the process was fair. **MR. STRAUSE** said that the FWP looked at this issue for a lot longer than six months. There was a lot of public input into the rule. The members of the advisory committee understand that they are not all going to get their way. It is the process that is important.

**MR. EBZERY** asked if **REP. HARRIS** had a problem with the process. **REP. HARRIS** said that the problem he saw was just with invoking the seasonal exceptions to the MAPA procedures. **MR. EBZERY** asked if the recommendation would be to do a limited exception to the rule or does he want them to toss the rule. **REP. HARRIS** said that the

Subcommittee's recommendation would be an objection to the rule, but have the effective date by May 30, 2002, giving the Commission the adequate time to redo the rule using the full MAPA procedure.

**MR. EBZERY** asked if, under MAPA, FWP can't get it done by May. **Mr. Hagener** said that was correct. There are also other requirements that need additional time, as well as educating new commission members. **MR. EBZERY** asked what would happen if the effective date was moved to June 30. **Mr. Hagener** said that the primary float season on those rivers is June-July.

**REP. CLARK** asked when the current rule would expire and what would replace the rule. **Mr. Hagener** said that the rule would expire May 1, 2003. At that time, the FWP would have to be in the process of putting a new rule in place, either another seasonal rule or a full MAPA rule. **REP. CLARK** asked what time would be adequate to address this process. **Mr. Hagener** said that it would depend on the public input and the number of drafts of the rule. The FWP's intent was to start the process with the advisory groups and do that over the next year. Those new rules would be in place for the 2003 float season. **REP. CLARK** asked if they currently have a time frame for a follow-up process to the seasonal rules. **Mr. Hagener** said that was correct. If the FWP doesn't do anything, the seasonal rule will expire and there will be no rules in place on May 1, 2003.

**SEN. McCARTHY** said that the recommendation of the Subcommittee is to object to the rule in its entirety, and that it would stay in effect until May 30, 2002. **REP. HARRIS** said that the objection would take effect on May 30, 2002.

**MR. STRAUSE** said that if this motion fails, the EQC will have made no recommendation. The FWP can proceed to examine the rule further and come up with something in 2003.

**SEN. EKEGREN** asked if he votes against the motion, what assurance does he have that the FWP will take the necessary effort to come up with a new program. **Mr. Hagener** said that the rule expires if the FWP does nothing. It is a huge issue. They don't expect this as the first or last river to be involved. That is why they want to look at it statewide through a governor's committee. It is a process that needs to be put in place to prevent future social conflicts elsewhere similar to what they are experiencing right now on the Beaverhead and Big Hole.

**VOTE:** Motion fails 6 to 10 on a roll call vote with REP. BARRETT, REP. HARRIS, REP. HEDGES, REP. LINDEEN, SEN. COLE, and MS. PAGE voting yes. See Attachment 3.

**MOTION/VOTE:** **MR. EBZERY** moved to accept the subcommittee reports. The motion passed unanimously.

**SEN. McCARTHY** asked that staff summarize what has been done in a letter and, after having the Subcommittee review it, send it to the Governor.

## **V      MISSOULA WHITE PINE SASH SITE REMEDIATION UPDATE**

**MR. MITCHELL** said that REP. MOOD brought this issue to the EQC as an example of a CECRA site. The White Pine Sash (WPS) facility is located on the north side of Missoula. The company used a wood-treating preservative and there was some of the chemical spilled. The company is no longer in business and the land has been sold. The DEQ is in the process of requiring remediation of the site. Scott Street Partners has purchased 30 acres of the site and has sold 10 of those acres to the city of Missoula.

- ***Background***

**Sandi Olsen, DEQ**, said that they have just hired a new project manager for the site and they have a schedule that they are committed to working through as expeditiously as possible.

**Denise Martin, DEQ**, referred to **Attachment 4**. The site is on the north side of Missoula and is being addressed under the state superfund program.

Pentachlorophenol (PCP) was used between the 1930s and the 1980s as a wood preservative. As a result of these activities there is contamination in both the soils and the ground water.

In 1989 an underground storage tank was removed and soil contamination was discovered. In 1993 another underground storage tank was removed and soil and ground water contamination was discovered. In 1994, the DEQ became the lead agency for the facility. In 1995, the DEQ issued an order requiring WPS and its parent company, Huttig, to perform a remedial investigation and feasibility study. This would determine the magnitude and extent of contamination, as well as what cleanup options are available. Between 1995 and 2001, several investigations and interim actions have occurred, including one investigation by the Missoula Health Department.

Huttig installed a total fluids recovery system and a soil vapor extraction system to test how productive these technologies would be at cleaning up the site. These systems have continued to operate and have been effective in addressing some of the concerns at the site. There was a hot spot removal.

In 1996, WPS shut down, there were subsequent property transfers and changes to the property, including a lot of demolition.

In 2001, a risk assessment work plan was finalized by the DEQ. This determined who is at risk, how great the risk is and what is causing the risk at the site.

At some point in time the contamination has moved into the Missoula aquifer. The perched aquifer evaluation needs to be completed. They also need to conduct a Fate and Transport Analysis. There is a potential for vapors from the contamination, the Fate and Transport Analysis will look at this, as well as protecting ground water from further contamination. Huttig will conduct a feasibility study that should be completed in the fall of 2002. Based on that, the DEQ will outline for the public what cleanup is possible. After



public comment the DEQ will issue a record of decision. The final step will be implementation of the cleanup. That may take place as soon as 2003.

Ms. Martin explained the ownership of the property: Zip Beverage, Missoula, Clawson, and Scott Street Partners all own various areas of the property.

Operable units may be used to make the site more manageable. It also will allow agencies to focus on the more high risk areas. Operable units would allow the grouping of cleanup activities and addressing of noncontiguous pollution areas. Operable units typically require more resources and there is some duplication in effort.

- ***Property Owners' Response***

**Mike Stevenson, Scott Street Partnership**, said the partnership currently owns 19 acres on the north side of the site. They have tried to convince the DEQ to consider taking steps to do interim actions on the 30 acres owned by the city and Scott Street. The reason for that request is that the only contamination on those acres is in the soil, not in the aquifer. They have had to pass up some development opportunities for the north side of Missoula because of the cleanup. They would like to have the DEQ clean up the hot spots. This wouldn't mean a lot of money or a lot of time.

Scott Street does understand the fate and transportation concerns. The DEQ is now doing ground water tests and can't do soil testing until that is completed. The owners would like to see the schedule firmed up. There have already been two extensions. They want to get the property released for "no further action," so that the land can be developed and facilitate economic development.

This is too simple an issue to not address it. They don't feel that they are putting the public at risk in asking for the interim actions. The big issue is the water.

**SEN. McCARTHY** asked how deep the hot spots are. **Mr. Stevenson** said they were three or four feet deep.

**Mayor Kadas, Missoula**, said that the huge problem for the site is the aquifer contamination. It is a very limited area of contamination. However, the development of the rest of the site is being held up because of that narrow site of water contamination. Under the superfund program the worst sites are dealt with first. In areas that are developed, they need to get the least contaminated sites taken care of so that the property can be developed commercially. This is important for the community. The remedies for the city property are simple and safe.

Part of the problem is the attitude that all superfund sites are the same. The WPS site is really two sites, one with minimal problems and one with serious problems. It needs to be treated as two sites. If the site is in an urban area, it should be dealt with differently than a rural site. The DEQ feels beleaguered and is unable to make hard decisions. They get attacked every time around and as a consequence, the DEQ is gun shy. That needs to be remedied. There are also severe staffing problems in the DEQ that also play into the problem. That is an economic development issue. Development is being hurt by the staffing and pay problems in the DEQ.

**Janet Stevens, assistant to the mayor**, noted that separation of another superfund site had been accomplished. It took a lot of time and work, but it can be done.

**Bob Oakes** said that when the WPS site first became identified, the Department of Agriculture was in charge of monitoring and cleanup because PCP was considered a pesticide. They hired a contractor to drill test wells. The DEQ then stepped in. If the site had been managed locally through the Missoula Health Department the cleanup would probably be completed now. It isn't that complicated of a site.

From a neighborhood perspective, they have been standing in line for 8 years now, but never get to the front of the line. The neighborhood has been stigmatized by having the site next to it. It is a bad thing for a community. This site is in a downtown area of Missoula. They need help to get this expedited and taken care of.

- **Council Discussion**

**REP. MOOD** said that this would be a good lesson for the Council in how these sites are dealt with. The pollution is at the south end of the property and the flow from that pollution is occurring to the south or off of the property. The north end of the property is being held up while the south end of the property is being dealt with. The city wants to separate the operable units, those units then could be dealt with. **Mayor Kadas** agreed that it was a simple way to deal with the problem.

**Mr. Stevenson** said that if the hot spots could be removed, the property could be developed safely with no further action needed. They don't want to be tied into a long-term schedule while the water is cleaned up, allowing nothing to be done while the water contamination is dealt with. That could go on for a long time. It is expedient and beneficial to the community to do the interim actions, remove the contaminated soil or hot spots, and get the site cleaned up.

**REP. MOOD** asked for the nature of the pollution on the north side of the property.

**Mr. Stevenson** said that PCP is the contaminant of concern, however, the ground water is 20 feet deep and the soil contamination is only 3 to 4 feet deep. They are fairly small hot spots. The polluted soil needs to be taken off the site and new soil filled in.

**REP. HARRIS** asked if the DEQ staff on the site has had a large turnover. **Brian Douglas, Huttig consultant**, has been working on the site since 1994. They have had three DEQ site project operators. **Mayor Kadas** wonders where this issue ranks on the priority scale.

**REP. HEDGES** asked if the hot spots on the north end are static. **Mr. Douglas** said that they have no reason to think that anything is moving. Ground water samples have not shown any contamination. Hot spots are areas of ground pollution. The levels of PCP are approaching background levels. What renders them a hot spot is the risk assessment that was done. The nature of the material is not considered hazardous waste and the quantity could be dealt with quickly.

**REP. HARRIS** asked if a request to separate the property had been made to the DEQ.

**Mr. Douglas** said that the group had formally requested that, but to the best of his knowledge there had been no answer received. **Mr. Stevenson** said that the issue of the Fate and Transport seems to get in the way of the DEQ being able to make a decision.

**REP. HARRIS** asked if removing the hot spots is a good idea and if that request needed to be made of DEQ. **Mr. Douglas** said that the purpose of the request for the characterization of the material, which is the first step of the process, is to find out if they can dispose of the material at a local landfill.

**SEN. TOOLE** asked what a brownfield site is. **Mayor Kadas** said that it is an industrial site close to an urban area with commercial and industrial opportunities that isn't developed because of some level of environmental degradation. **Mr. Oakes** added that there was some legislation to define brownfield sites. These sites have federal money dedicated to them, but they have liability problems. Because DEQ is not getting its job done, the property sits vacant and stigmatizes the community. Prospective developers are being told to build at their own risk.

**SEN. TOOLE** asked how contaminated aquifers are addressed. **Mr. Douglas** said that you can clean up ground water without impacting surface uses. **SEN. TOOLE** asked if there is development on the land and it is later found that there is water contamination, what has to be taken out to clean up the water. **Mr. Douglas** said that the WPS site, the ground water contamination is downstream. They have proven to DEQ's satisfaction that there is no contamination of ground water on the northern part of the property. **SEN. TOOLE** asked if the perched aquifer flows the same direction. **Mr. Douglas** said that there is not much of a perched aquifer in the northern property. **SEN. TOOLE** asked if there is the potential that the perched aquifer may flow in a different direction. **Mr. Douglas** said that it could. The perched aquifer has never been found to be contaminated in the northern property. **SEN. TOOLE** asked if it had been found to be contaminated in the southern property. **Mr. Douglas** said that it had. **SEN. TOOLE** asked when the monitoring of the ground water started. **Mr. Douglas** said it started in 1993.

**MS. PORTER** asked for the number of monitoring wells. **Mr. Douglas** said 50 to 70 wells. **MS. PORTER** asked when the last one was put in. **Mr. Douglas** said that they had tried to put some wells in over the summer, but the area was dry. Before that the most recent wells were put in about three years ago. **MS. PORTER** asked what had changed in the last three years to give more confidence as to the ground water flow. **Mr. Douglas** said that the Missoula aquifer typically flows to the south. It doesn't flow very fast, but they are going to be doing some more studies on that. They have a number of monitoring wells around the contamination to track that flow.

**MR. STRAUSE** said that the long process is partly a result of staffing in the DEQ. **Ms. Olsen** said that the DEQ is experiencing 50% turnover at grade 15 across the department. It is not specific to this program. The director has indicated that the DEQ is working on a priority basis related to public health. They need to have an interim action proposal to move forward.

**SEN. TOOLE** clarified that it was a 50% per year turnover at grade 15. **Ms. Olsen** said that was correct.

## **VI SAGE GROUSE PANEL DISCUSSION – AN OVERVIEW OF THE ISSUE**

**John McCarthy, FWP**, said that sage grouse were described as existing in Montana by Lewis and Clark. Over the last several years it has been noted throughout the western states that the sage grouse population is declining. In 1995, a memorandum of understanding (MOU) was put together by the Western Association of Fish and Wildlife Agencies. The director of FWP signed on to that MOU. The MOU is an agreement between the states to put together a conservation effort for the sage grouse.

In 1999, the Biodiversity Legal Foundation requested a synopsis of the information about the status of sage grouse in the state. The same information was requested from all western states. At that time it became apparent that there was a movement to put the sage grouse on the endangered species list. In 1999, the American Land Alliance held a meeting that produced a resolution to do a range wide listing petition for the sage grouse.

A lot of the concern has come about because of the large decline of sage grouse populations. Sage grouse have been reduced to portions of 11 states and one Canadian province. As a result of this, Montana began a conservation planning effort. They looked at where the sage grouse are in the state. Most of the sage grouse population falls in the eastern half of the state. However, 50% of the occupied habitat has yet to be surveyed.

The group working on the sage grouse conservation plan is made up of 35 people from all walks of life. They have heard from different experts about a variety of issues that have come up. These experts have helped to develop the conservation actions. They are developing a statewide conservation plan. It will help put together working groups and help agencies implement conservation actions. The plan will provide a toolbox rather than a set of standards. The plan will help FWP in allowing expanded monitoring in order to determine where the birds live and other biological information needed about the sage grouse.

They are currently counting 400 active leks, or breeding grounds, in the state with 11,000 males on those leks last year. That indicates that Montana has a good and strong sage grouse population. The average number of males on these leks is currently on an increase, but overall the average numbers are dropping all the time. The overall goal is no net loss of sage grouse and sage grouse habitat over the long term. We need to keep a consistent amount of sagebrush on the ground for the birds.

Hunting is an issue. Should we be hunting a bird that other states consider threatened? In Montana there is a 60-day hunting season, which has been decreased by over 40 days. It can still be considered a liberal season. The number of birds being harvested has dropped significantly. The average harvest over the last four years has remained steady at about 8,000 birds, which is a very small percentage of the total population. The FWP doesn't feel that hunting is an issue in the decrease of the sage grouse population. The conservation plan calls for a season that is more responsive to the number of birds seen in the spring.

Sage grouse habitat is declining and is one of the biggest factors in the declining population. It has dropped 50% over the last 50 years. Sage grouse make use of alfalfa fields and other agricultural fields with green forage, but that doesn't compensate for the loss of sagebrush habitat. In the conservation plan, they are looking at protecting the

priority sage grouse areas that are left and possibly restoring sage grouse habitat in areas where the loss of habitat is felt to be an issue. There is the possibility of working with the landowners.

Another issue is grazing. They are working with the Montana Stock Growers and others to put together the conservation actions as far as grazing.

Oil and gas is an issue. CBM development has the ability to have an effect over a large area of sage grouse habitat in the state. The FWP has worked with the agencies and people that deal with siting, mitigation, and rehabilitation on the conservation actions. They hope to work with the industries in an adaptive manner that will allow development to take place, mitigating the effects during development.

Fire has been a big issue recently. Millions of acres of habitat are lost every year to fire. It takes up to 30 years for sagebrush to come back after a fire. They are working with the agencies to make sure that sage grouse are given consideration when fires are set on the landscape.

Predators are another big concern. Predators are recognized as having an effect on populations. The majority of the information indicates that different predators have different effects on populations. Public comment indicates that coyote control is wanted, which would not help the sage grouse in the long run. Predatory birds cause about 80% of the predation on sage grouse and they are protected by the Migratory Bird Act. As far as putting in statewide predator control, it would be very intensive. It would only work as long as it was being done.

The conservation plan must include biological goals and objectives, management strategy, conservation objectives and adjustments, monitoring program and public participation. The ability to put the plan in place when it comes out is also important. They are making an effort to ensure that the uses of the land that are out there now remain out there.

**Ben Deeble, National Wildlife Federation (NWF)**, referred to **Attachments 5, 6, and 7**. He said that he is on the resource advisory committee for western Montana. The future of sage grouse is in doubt. They have been driven regionally extinct in many areas. They are already being called the next spotted owl because conservation of the species may be on a collision course with major economic sectors such as agriculture and oil and gas development. The NWF has taken a position against listing the sage grouse range wide.

In Montana there are still thousands of birds. If action is taken in Montana, then Montana may preclude federal intervention. Montana has some small areas of habitat where sage grouse populations are likely to be lost. For  $\frac{3}{4}$  of the year the birds eat only sagebrush, but they use it for shelter year round. Dense stands of sagebrush that have taken up to 100 years to develop are the most important for sage grouse. Many current sage grouse habitats were plowed or burned in the past. Sage lands often take 25 years to recover, if they recover at all.

Historically, many sites have been converted to hay fields, or to other grains. Sage grouse don't benefit from grain, unlike many other bird species. Other activities such as off-road travel can also affect the population by spreading weeds or disturbing the birds in their

habitat. In the past, millions of acres of sagebrush have been burned. Since the 1950's herbicides have been used on the sagebrush. This practice is still in use today. Often, the eradication of sagebrush leads to worse range abuse than before the plant was removed. In many places sagebrush is removed from the landscape permanently for irrigation purposes. Noxious weeds are also invading sage grouse habitat.

Over 90% of sage grouse nests are found beneath sagebrush. Dense stands of sagebrush are needed to shelter the nests and ensure that the eggs hatch. Nest predators are a problem.

Power lines are a problem because the birds often fly into them, considering that sage grouse do a lot of low-light flying. The wires also give golden eagles a place to perch while hunting the sage grouse. This makes the eagles a much more effective predator.

Populations are declining all over. This is consistent among all the states. Productivity of the sage grouse has been declining since the mid 1970's. He emphasized that we need to work together on this issue. There needs to be an exchange of information, not a rebellion. Idaho has already implemented local working groups to deal with this issue. We need to recognize that sage grouse are special. They are one of the more sensitive species on the landscape. We need to avoid the polarizing politics like were found in the spotted owl situation.

**John Bloomquist, Stock Growers Association**, said that this issue is going to be very important to the agricultural community in Montana. This is no longer a regional issue. We are seeing a lot of the land management issues come to a point. Is the FWP getting into the land management business or habitat management business in their conservation plan? If so, is that appropriate? Do memorandums of understanding dictate what will happen?

The state working group has some diverse participants and there have been some public discussions. However, a certain amount of the process has its hands tied as a result of some MOUs that were entered into by FWP and other agencies.

Generally, grazing today is being conducted more ecologically sound than it was in the past. One of the concerns the livestock industry has is eliminating the uplands from livestock grazing. You have to be able to get to the uplands for grazing. If the standards and guidelines are adopted on the bottom, there isn't anywhere to go if the standards aren't appropriate. One of the major errors that could be made in this plan would be to develop blanket standards and guidelines. To date this plan doesn't do that, but there are some implications that cause concerns about the guidelines. Range managers and others are going to be asking if the guidelines are appropriate or realistic.

Ranchers and landowners don't see sage grouse as a problem. More monitoring of the populations need to be done before a conservation plan can be made. Population information is more than numbers. There seems to be a gap between what we know about sage grouse population and a conservation plan.

There isn't a lot of understanding of the connection between grazing and the sage grouse population. A statewide conservation plan is not the best move considering the statewide

diversity. To finalize something at this point would lead to mistakes. Assumed cause-and-effect relationship is unpopular in the agricultural perspective.

Federal land managers will follow the guidelines in the plan. Standards and guidelines on a federal land permit are obligations that the permit holder must meet. If you violate a standard or guideline you will violate a condition of your permit. Grazing guidelines must be achievable, and must get the job done. The conservation plan has ramifications not only for grazing, but also oil and gas, energy development, and recreation.

A policy issue for the Legislature to deal with is whether FWP has habitat management authority or not. He doesn't think that it does. There will be a statewide conservation plan that will be the product of public hearings around the state, but to date there hasn't been any analysis of the statewide conservation plan ramifications. This is a complex question.

**REP. CLARK** asked about a meaningful analysis of a statewide plan. Would there be an evaluation before it goes in place? **Mr. Deeble** said that MEPA is not triggered by FWP entering a MOU that commits them to planning. MEPA may be triggered when the plan proposes a major action on the ground. They would welcome analysis at that stage because it would confirm the need for the plan. The analysis is appropriate and should occur. They believe that FWP has the authority to have gone as far as they have and that it is the right direction to be working.

**REP. CLARK** asked if the working group comes up with a plan, what is the alternative? **Mr. Bloomquist** said that the key premise is that the plan will prevent a listing. He doesn't think that it would. The groups who want a listing will continue to litigate until they get the listing. If we do nothing, there could be a listing. If we do the plan, there could be a listing.

**SEN. TOOLE** asked if Mr. Bloomquist would suggest doing nothing. **Mr. Bloomquist** said that is not the answer. We are being called upon repeatedly in the state to develop species management plans, he wonders if that is the role of FWP as a wildlife management agency. Do we need a plan for every species that comes along and are we using the proper process to address the issues with those species? **SEN. TOOLE** asked who else would do it, other than FWP. **Mr. Bloomquist** said that FWP is the agency with wildlife management expertise, but not with resource management expertise. If habitat management is going to be the role of FWP, it needs to be clarified.

**REP. HEDGES** asked, considering that 50% of sage grouse habitat is on private land, if there is to be no net loss of grouse habitat, how does the conservation plan address property rights issues. **Mr. McCarthy** said that it forces the agencies to work closely with private landowners on a local level. This is a better opportunity than if the bird is listed and the federal government takes over the management of the species and habitat. This is a dynamic ecosystem and change is to be expected. **REP. HEDGES** asked if the predator population had been tracked in reference to the sage grouse populations.

**Mr. McCarthy** said that they haven't done that in every case. There have been studies done that looked at that. Generally, if the sage grouse numbers get above a certain level, the number of predators doesn't have a distinct impact. **REP. HEDGES** asked if it would be easier from a management standpoint to control the power poles versus the hawks and would it be detrimental to the energy development and development of other natural

resources in Montana. **Mr. McCarthy** said that in some cases it could be, but there are other options. Power lines can be buried or moved slightly. They have been working with MPC in putting the conservation actions together.

**MR. EBZERY** asked if the listing is imminent. **Mr. McCarthy** said that they are not sure where the petition is. There are several groups working on the petition. They are expecting a petition. **MR. EBZERY** asked if the FWP had any input into the petition.

**Mr. McCarthy** said that the FWP would receive the petition. At that time the petition asks for all the information that the FWP has on the species. If there are conservation actions or plans, they will become part of the record at that point. **MR. EBZERY** asked where the public would be involved. **Mr. McCarthy** said that the public is allowed input throughout the process with hearings, written comment, before the decision about the listing is made. **Mr. Bloomquist** said that the public would have the opportunity if they knew about it. The public input is fairly minimal.

**REP. BARRETT** asked if signing the MOU put the responsibility on Montana to compensate for the populations in other states. **Mr. McCarthy** didn't believe that it did. The MOU says that we are to maintain the population and the amount of habitat.

**REP. BARRETT** asked if any of the other signers of the MOU increased the bag limit this year. **Mr. McCarthy** said he couldn't respond. **REP. BARRETT** said that Montana was the only signer of the MOU that she knew of that increased the limit this year. Why is harvesting recovering the sage grouse population when it is reducing the population of other animals? **Mr. McCarthy** said that the FWP is saying that there is a surplus and that hunting is not harming the population. Hunting also keeps interest in the species up. **REP. BARRETT** asked if Mr. McCarthy felt that they were in violation of the MOU. **Mr. McCarthy** said that he did not.

**SEN. COLE** asked where the petition may be coming from. **Mr. McCarthy** said that the American Land Alliance is heading up the petitioning process. They have been working on the petition for over two years. Nobody has seen it, but there is evidence that there is a petition in the works.

**REP. CLARK** asked if this concern is growing, would the NWF recommend to limit the harvest at this point. **Mr. Deeble** said that he would support the adaptive harvest management regime that the FWP is looking at. This would allow for seasons to be reduced, if populations were shown to have a sharp decline. During some years there is a harvestable population of sage grouse. However, when you can show a downward trend in population, harvesting should be restricted.

**MS. PAGE** asked if FWP had any input in the statewide EIS that is being developed. **Mr. McCarthy** said that the department had been given the opportunity to comment on the draft. **MS. PAGE** asked if the FWP is also working with the interests of ranchers in mind on these issues. **Mr. McCarthy** said that they have had a number of ranchers that have helped put the document together. They have invited input from the ranchers throughout the process. **MS. PAGE** asked for Mr. Bloomquist to respond. **Mr. Bloomquist** said that there had been livestock growers at the meetings. They are concerned with the inclusion of the



standards and guidelines as an appendix. The concern lies in whether those are the appropriate guidelines.

**SEN. EKEGREN** asked if this is going to keep a rancher from clearing his own land if he chooses. **Mr. McCarthy** said that until the bird is listed, private land is private land. After the bird is listed there are regulatory stipulations that must be met.

**SEN. EKEGREN** asked if the property rights will be enforced even if the species is listed. **Mr. McCarthy** said that the private landowner would be responsible for the species on his property. The level of that responsibility comes if the landowner undertakes a project.

**SEN. EKEGREN** asked who pays to move the power lines. **Mr. McCarthy** said that they are working with Montana Power Company and are just asking for new lines to be buried or locations considered for new lines. **SEN. EKEGREN** asked if they were ever going to ask for MPC to replace any of their lines. **Mr. McCarthy** doesn't think that they would ask for removal.

## **VII      OTHER BUSINESS**

**SEN. McCARTHY** said that she had met with the governor's office about the transplanting of pheasants in eastern Montana. The FWP has new people in place since this issue was first brought up. They are all dedicated to making the rules that were passed in SB 304. It was the consensus of the group that had met to have the EQC monitor the corrections in the program. The FWP will try to implement the new rules and keep everyone informed of the progress.

**REP. MOOD** also attended the meeting. There is frustration because the funding for Smith's bill was not used for what he had hoped. The current administration doesn't want to take ownership of the problem. If he wants to see something happen, he must file a complaint.

**SEN. McCARTHY** asked that staff monitor this and keep the Council informed.

**SEN. McCARTHY** said that there is a pending Natural Resource Leadership Institute program available through the Consensus Council. If anyone is interested in attending this they should contact her. It would be a 4-month commitment.

**SEN. McCARTHY** said that the fire funding study presentation has been rescheduled to the July meeting.

**Ed Smith, former legislator**, said that the legislative auditor and REP. HEDGES will also be reviewing the rules that the EQC will be discussing. Over the last 13 years FWP has spent 8.3 million dollars and there has been little improvement with the upland game bird population. He hopes that the issue can be handled in the state agencies.

## **VIII      CONFIRM LOCATION OF NEXT MEETING AND INSTRUCTIONS TO STAFF**

**SEN. McCARTHY** said that the next meeting is to be held in Helena.

**IX      ADJOURN**

There being no further business the meeting was adjourned.

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